



**ROBINSON MCFADDEN**  
ATTORNEYS AND COUNSELORS AT LAW

ROBINSON, MCFADDEN & MOORE, P.C.

COLUMBIA | GREENVILLE

January 25, 2005

**HAND DELIVERED**

Mr. Charles Terreni  
Chief Clerk of the Commission  
Public Service Commission of South Carolina  
Synergy Business Park, Saluda Building  
101 Executive Center Drive  
Columbia, SC 29210


**Re: Columbia Energy LLC  
Docket No. 2004-267-E  
Our File No. 03471-0003**

Dear Mr. Terreni:

On Monday, January 24, 2005, Columbia Energy filed its Memorandum in Opposition to SCE&G's Motion for Stay in the above referenced case. We inadvertently omitted Exhibit 1, *In the Matter of H.J. Heinz Co.*, 2001 FTC Lexis 6. Enclosed for filing is Exhibit 1 to the Memorandum. We apologize for the oversight. By copy of this letter we are serving a copy of Exhibit 1 on counsel for other parties of record. Please stamp the extra copies provided as proof of filing and return them with our courier. Should you need any additional information, please contact me.

Yours truly,

ROBINSON, MCFADDEN & MOORE, P.C.

  
Frank R. Ellerbe, III

FRE/bds  
Enclosure  
cc/enc:

Douglas C. Turner, Esquire  
Mitchell Willoughby, Esquire  
Paige Gossett, Esquire  
Len S. Anthony, Esquire  
Kendall Bowman, Esquire  
Dan F. Arnett, ORS Chief of Staff

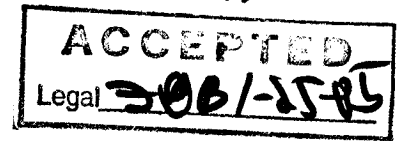
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BEFORE THE  
PUBLIC SERVICE COMMISSION  
OF SOUTH CAROLINA

Docket No. 2004-267-E

In re:

PETITION OF COLUMBIA  
ENERGY LLC FOR A  
DECLARATORY ORDER  
CONCERNING AGREEMENT  
WITH SCE&G FOR WAIVER OF  
QUALIFYING FACILITY STATUS

EXHIBIT 1 OF  
COLUMBIA ENERGY LLC'S  
MEMORANDUM IN OPPOSITION  
TO SCE&G'S MOTION  
FOR STAY

EXHIBIT 1

*In the Matter of H.J. Heinz Co., 2001 FTC 6*

2005 JUN 05 PM 1:35  
COMMUNICATIONS SECTION

LEXSEE 2001 FTC LEXIS 6

In the Matter of H.J. HEINZ COMPANY a corporation; MILNOT HOLDING CORPORATION, a corporation; and MADISON DEARBORN CAPITAL PARTNERS, L.P., a limited partnership

Docket No. 9295

Federal Trade Commission

2001 FTC LEXIS 6

ORDER STAYING PROCEEDINGS

January 17, 2001

ALJ: [\*1]

D. Michael Chappell, Administrative Law Judge

**ORDER:**

**ORDER STAYING PROCEEDINGS**

On January 10, 2001, Respondents H.J. Heinz Co. and Milnot Holding Corp., pursuant to 16 C.F.R. § 3.51(a), filed a motion to stay further administrative proceedings in the above captioned matter pending the decision of the D.C. Circuit Court of Appeals in *F.T.C. v. H.J. Heinz Co., et al.*, Case No. 00-5362 (D.C. Cir. 2001). Complaint Counsel does not oppose this motion.

The above captioned matter is hereby STAYED until fourteen days after the D.C. Circuit Court of Appeals issues its decision in *F.T.C. v. H.J. Heinz Co., et al.*, Case No. 00-5362 (D.C. Cir. 2001).

**ORDERED:**

To: The Honorable D. Michael Chappell Administrative Law Judge

**MEMORANDUM IN SUPPORT OF RESPONDENTS' MOTION TO STAY PROCEEDINGS**

Respondents H.J. Heinz Company ("Heinz") and Milnot Holdings Corporation ("Beech-Nut") submit this memorandum in support of their motion for a stay of administrative proceedings pending the decision of the D.C. Circuit Court of Appeals in this matter. Complaint counsel does not oppose this motion. (Pretrial Conference Transcript, Dec. 20, 2000 at p.9, attached at Tab A).

**PROCEDURAL BACKGROUND**

The Federal [\*2] Trade Commission ("FTC" or "Commission") challenged the Heinz acquisition of Beech-Nut in July, 2000 seeking a preliminary injunction before the federal district court for the District of Columbia. After a five-day full evidentiary hearing, Judge Robertson denied the Commission's request for a preliminary injunction. *F.T.C. v. H.J. Heinz Co., et al.*, 166 F. Supp.2d 190 (D.D.C. 2000). Thereafter, the FTC noticed its appeal of the district court decision, and the D.C. Circuit, after granting an injunction pending appeal, set an expedited schedule for the appeal. The Commission submitted its brief to the court on November 29, 2000 and appellees submitted their brief on December 29. The FTC's reply brief is to be filed today, January 10, 2001, and argument is scheduled for February 12. The Commission filed its administrative complaint in this matter on November 22, 2000.

**DISCUSSION**

Because the D.C. Circuit's decision will determine the outcome or, at the very least, substantially shape the course of administrative proceedings in this matter, respondents Heinz and Beech-Nut request a stay of the present Commission proceeding. Granting a stay pending review by the D.C. Circuit is an [\*3] appropriate exercise of the Administrative

Law Judge's ("ALJ") discretion. Under 16 C.F.R. § 3.51 an ALJ "may stay the administrative proceeding until resolution of the collateral federal court proceeding." Moreover, to accommodate the issuance of such an order, 16 C.F.R. § 3.51(a) explicitly provides that the "pendency of any collateral federal court proceeding that relates to the administrative adjudication shall toll the one-year deadline for filing the initial decision."

Given the pendency of the appeal of the district court decision in this matter, any further action in this administrative forum at this time runs the risk of being obviated by the opinion of the D.C. Circuit. That is, if the D.C. Circuit reverses the district court's denial of the FTC's request for a preliminary injunction, respondents have unequivocally stated that they will abandon the transaction, rendering moot the liability phase of administrative proceedings before the Commission. In the alternative, should the D.C. Circuit uphold the lower court's denial of the preliminary injunction, respondents will move for dismissal under the express provisions of 16 C.F.R. § 3.26(c) (Motions Following Denial of Preliminary [\*4] Relief). The FTC would then decide whether further litigation would be in the public interest. n1

n1 In 1995, the FTC adopted a policy of not automatically pursuing administrative litigation when injunctive relief has been denied. See 60 Fed. Reg. 39741, 39743 (1995). Rather, upon denial of preliminary relief, the FTC will make a case-by-case determination as to the propriety of conducting administrative litigation, considering, among other factors: the legal and factual findings of the courts; the policy implications of the case; and the costs and benefits of further proceedings. A stay of administrative proceedings pending decision from the D.C. Circuit would be the most prudent course of action, allowing the Commission to consider the complete landscape of factors before embarking on efforts in an administrative proceeding that might prove to be wasted.

Further, it should be noted that in every recent case where the FTC filed an administrative complaint while an appeal of the district court's decision regarding a preliminary injunction was still pending with a circuit court, the administrative action was terminated after the circuit court affirmed the denial of preliminary relief. See *Butterworth Health Corp.*, 124 F.T.C. 424 (1997) (Order Granting Motion to Dismiss subsequent to 6th Circuit decision); *Freeman Hospital*, 120 F.T.C. 1003 (1995) (Order Dismissing Complaint issued after 8th Cir. decision); *Hospital Board of Directors of Lee Co.*, 120 F.T.C. 1 (1995) (Order Sua Sponte Dismissing Proceeding subsequent to 11th Circuit decision) (hereinafter *Lee Memorial Hospital*); See also, *Tenet Healthcare*, 1999 FTC LEXIS 267 (1999) (Order Dismissing Complaint issued after 8th Circuit decision).

[\*5]

Even if the Commission voted to pursue further action, however, the D.C. Circuit's opinion would shape any continued litigation in this forum. If the FTC does not prevail in the current appeal to the D.C. Circuit, the Commission in its administrative proceedings will, as a practical matter, be obligated to go beyond the arguments that it unsuccessfully presented to both federal courts, given that the burden of proof rests with the Commission and any appeal of an administrative decision would ultimately be made to the D.C. Circuit. To do otherwise would result in identical shortcomings in the FTC's administrative case and would yield an entirely duplicative effort with no different result. For that reason, proceeding with discovery at this time, such as the exchange of witness lists and expert reports, is premature and would result in the unnecessary expenditure of resources by the parties and the Commission.

There is ample precedent for a stay of administrative proceedings in merger cases pending collateral litigation in federal court. Most recently, in *Tenet Healthcare*, a stay of administrative proceedings was granted pending appellate review of the district court's decision on the [\*6] issuance of a preliminary injunction. *Tenet Healthcare*, Docket No. 9298 (Sept. 15, 1998) (attached at Tab B). In doing so, substantial burdens on all parties were avoided by eliminating duplicative efforts in collateral proceedings. And ultimately, the FTC's administrative complaint was dismissed following the Eighth Circuit's finding that the Commission had failed to make the proper showing necessary for injunctive relief. *Tenet Healthcare*, 1999-2 Trade Cas. P72,578 (8th Cir. July 21, 1999).

Similarly, in *Lee Memorial Hospital*, the FTC sought to preliminarily enjoin the merger of two hospitals in Florida. The district court for the Middle District of Florida denied the motion and the Commission appealed the decision thereafter. When the FTC instituted administrative proceedings while the case was on appeal, the hospitals sought and were granted a stay of administrative proceedings, as the 11th Circuit decision could dispose of the matter entirely. *Lee Memorial Hospital*, Docket No. 9265 (June 20, 1994) (First Order Granting Stay) (attached at Tab C). When the stay issued by the ALJ lapsed prior to issuance of the decision by the 11th Circuit, the ALJ then issued a second stay that [\*7] also lapsed. *Lee Memorial Hospital*, Docket No. 9265 (Aug. 26, 1994) (Second Order Granting Stay) (attached at Tab D). Although the ALJ declined to issue an additional stay, in the interest of administrative and judicial economy, the 11th

Circuit itself stayed the administrative proceedings. *F.T.C. v. Hospital Board of Directors of Lee Co.*, Case No. 94-2642 (11th Cir. 1994) (Order Granting Emergency Motion to Stay Administrative Proceedings) (attached at Tab E). Thereafter, the 11th Circuit affirmed the District Court's ruling in favor of defendants and the Commission subsequently closed its administrative case.

#### **CONCLUSION**

Given the procedural posture of this matter, a ruling by the D.C. Circuit will likely be dispositive of the case or, at a minimum, will frame the substantive issues to be determined in these administrative proceedings. For all the foregoing reasons, respondents' motion for stay of administrative proceedings pending decision by the D.C. Circuit in this matter should be granted.

Respectfully submitted,

**BEFORE  
THE PUBLIC SERVICE COMMISSION  
OF SOUTH CAROLINA**

**DOCKET NO. 2004-267-E**

In re:

Petition of Columbia Energy, LLC  
for a Declaratory Order Concerning  
Agreement with SCE&G for Waiver  
of Qualifying Facility Status

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**CERTIFICATE OF SERVICE**

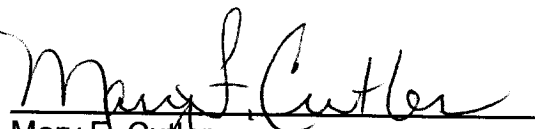
This is to certify that I, Mary F. Cutler, a legal assistant with the law firm of Robinson, McFadden & Moore, P.C., have this day caused to be served upon the persons named below the **Exhibit 1 of Columbia Energy LLC's Memorandum in Opposition to SCE & G's Motion for Stay** in the foregoing matter by placing a copy of same in the United States Mail, postage prepaid, in an envelope addressed as follows:

Paige J. Gossett, Esquire  
Mitchell Willoughby, Esquire  
Willoughby & Hoefer, P.A.  
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Charles H. Williams, II, Esquire  
Williams & Williams  
370 St. Paul Street N.E.  
PO Box 1084  
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Len S. Anthony, Esquire  
Kendal Bowman, Esquire  
Progress Energy Service Company, LLC  
Post Office Box 1551  
Raleigh, NC 27602

Dated at Columbia, South Carolina this 25<sup>th</sup> day of January 2005.

  
\_\_\_\_\_  
Mary F. Cutler